

NO. 46587-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ROBLES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable David E. Gregerson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Denial of appellant's motion for a mistrial denied him a fair trial.

2. Prosecutorial misconduct in closing argument denied appellant a fair trial.

Issues pertaining to assignments of error

1. Appellant was charged with third degree rape of a child, and the State's case rested solely on the testimony of the complaining witness. When questioning the witness on direct examination, the prosecutor implied that threatening communications to the witness and her family demonstrated appellant's guilt. Where there was no evidence that any such threats were connected to appellant or made with his knowledge or consent, did the court err in denying appellant's motion for a mistrial?

2. During closing argument the prosecutor expressed his personal belief in the alleged victim's testimony, called appellant's testimony ridiculous, and assured the jury that appellant was guilty. Did this improper argument deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

On November 21, 2013, the Clark County Prosecuting Attorney charged appellant Nicholas Robles with one count of rape of a child in the third degree. CP 1; RCW 9A.44.079. The case proceeded to jury trial before the Honorable David E. Gregerson, and the jury returned a guilty verdict. CP 46. The court imposed a standard range sentence, and Robles filed this appeal. CP 82, 98.

2. Substantive Facts

In February 2012, SK reported to Battle Ground Police Officer Joshua Phelps that she had had sex with Nicholas Robles in January 2011, when she was 15 years old and he was 28 or 29. RP 72, 89-90, 146. SK gave a description of Robles's house and provided Phelps with his email address. RP 73-74, 79.

SK and Robles met through mutual acquaintances from church, and they saw each other occasionally at a local park. RP 75, 94, 96, 166. SK became infatuated with Robles. RP 95, 98. They exchanged emails and text messages, and she sent him photos of herself partially and totally nude. RP 76-77, 98, 101. SK testified that Robles asked her to send him some nice pictures, and it was her idea to send him nude photos. RP 101, 161-63. SK testified that she wanted to pursue a relationship with Robles, but he kept closing the door on her. RP 161.

SK testified that one day in January 2011, she skipped school, and Robles picked her up and brought her to his house to go hot-tubbing. RP 104. Once there they changed into their swimsuits and used the hot tub. RP 104-05. SK said that Robles put her on his lap and held her. RP 106. They then went to Robles's bedroom. RP 114. SK testified that Robles tried to put his penis in her vagina, but she told him she would rather have anal intercourse. He then applied a lubricant and put his penis in her anus. RP 115. Afterward, they both showered. RP 117-18. SK testified that she told her parents about the incident the next day, but she asked them not to call the police because she had feelings for Robles and she believed she might get in trouble. RP 120.

SK and Robles continued to exchange emails after January 2011, but they did not spend any time together. RP 121. Sometime in December 2011, SK was with a group of people at a park, and she became upset when she saw Robles with another woman. SK started yelling at Robles that she loved him. RP 150-51. By the time of the December incident, SK was dating the man she eventually married in June 2012. RP 150-51. When she told her future husband about Robles, he insisted she report their contact to the police. RP 124. He showed her a Washington law about statutory rape, and they counted back from that date to figure out how old she was and when the contact occurred. RP 124, 150.

Phelps talked to Robles in July 2012. RP 75. Robles admitted that his text and email communications with SK had probably been inappropriate and that he was playing along with her infatuation, but he denied having sex with her. RP 76, 90, 167. He said they talked about having a hot tub party, but that never happened, and she had not been to his house. RP 77. When asked how she would be able to describe the house if she had not been there, Robles said he believed she had seen pictures of the house. RP 78.

Robles explained at trial that he had shown a camera with pictures of the house to some friends when he was looking for someone to work on a remodeling project. SK was there at the time, and she ended up with the camera, which was returned to Robles a few days later. RP 170-72. He testified that SK had never been to his house and he had never had sex with her. RP 170.

C. ARGUMENT

1. THE COURT'S REFUSAL TO DECLARE A MISTRIAL DEPRIVED ROBLES OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

- a. **The trial court denied Robles's motion for mistrial.**

During direct examination of SK, the prosecutor asked when she found out that the case would be going to trial, and she answered that she

had found out the previous Thursday. The prosecutor then asked whether, since Thursday, anyone had been contacting her friends and family about this case. RP 126. Defense counsel objected, and the court sent the jury out of the courtroom. RP 126. The prosecutor explained that he believed Robles's friends and family members had been calling SK's family since the case was called the past week. He argued that this possible intimidation was relevant to show Robles's consciousness of guilt, although he admitted that these alleged communications did not come from Robles. RP 127.

Defense counsel argued that the information was not relevant because there was no showing that any communications were connected to Robles, and since the communications were not made to SK, they were hearsay. Moreover, the prosecutor had not informed the defense about these communications or sought a ruling on their admissibility before asking about them in the jury's presence. Counsel argued that the clear implication of the prosecutor's question in front of the jury was that Robles had been intimidating the witness. RP 127. The court sustained the defense objection, finding that the relevance was limited at best, and the evidence was highly inflammatory and prejudicial. RP 128.

The defense then moved for a mistrial. Counsel argued that the prosecutor's question implied that the defendant had been contacting SK's

family, and no instruction to disregard could cure that prejudice. RP 129-30. The court denied the motion, concluding that the question was somewhat innocuous, was not answered, and was insufficient to rise to the level of requiring a mistrial. RP 131. When the jury returned, the court instructed it to disregard the prosecutor's question. RP 133.

b. The prejudice resulting from the serious trial irregularity was not cured by the court's instruction to disregard.

The fundamental right to a fair trial is guaranteed by the United States and Washington Constitutions. U.S. Const. amends. VI and XIV; Wash. Const. art. I, § 22. The erroneous denial of a motion for mistrial violates that right. See State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (proper question in determining whether trial irregularity such as an improper remark requires mistrial is whether the irregularity "prejudiced the jury, thereby denying the defendant his right to a fair trial.")).

A trial court should grant a mistrial when a trial irregularity is so prejudicial that it deprives the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). In determining whether a trial irregularity deprived the defendant of a fair trial, the appellate court considers (1) the seriousness of the irregularity, (2) whether the challenged evidence was cumulative of other properly admitted evidence, and (3)

whether the irregularity could have been cured by an instruction to disregard. Babcock, 145 Wn. App. at 163; State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). An appellate court reviews a decision on a motion for mistrial for an abuse of discretion. Babcock, 145 Wn. App. at 163.

In Babcock, the defendant was charged with child rape, harassment, and kidnapping as to one child and child molestation as to a second child. Hearsay testimony as to the child molestation charge was admitted at trial, but when the child refused to testify, the charge was dismissed. The trial court denied Babcock's motion for a mistrial, however, and instead instructed the jury to disregard the child molestation allegations. The Court of Appeals held that the trial court abused its discretion by refusing to grant a mistrial. Babcock, 145 Wn. App. at 158.

First, the testimony regarding the child molestation charge amounted to evidence of other bad acts, which is an extremely serious trial irregularity. Because the verdict on the remaining charges depended solely on the credibility of the victim's testimony, which was at times inconsistent, the testimony regarding the dismissed charge had a high potential for prejudice. Id. at 163-64. Next, because evidence of the child molestation allegations was not cumulative of evidence concerning the

remaining charges, that factor also weighed in favor of a mistrial. Id. at 164.

Finally, the Court of Appeals considered whether the trial court's instruction to disregard testimony regarding the molestation could have cured the irregularity. It noted that, despite the presumption that jurors will follow the court's instructions, "no instruction can "remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors."'" Id. at 164 (quoting Escalona, 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968))). The court held that there was no guarantee the jury could effectively disregard the highly prejudicial evidence of other similar acts. Babcock, 145 Wn. App. at 165.

The trial irregularity in this case similarly involved evidence of other bad acts. While in Babcock the evidence was properly admitted but became prejudicial once the molestation charge was dismissed, here the prosecutor referred to evidence that was not and could not be properly admitted.

Generally the prosecution may offer evidence that a defendant threatened a witness as implication of guilt. State v. Kosanke, 23 Wn.2d 211, 215, 160 P.2d 541, 543 (1945). Where the threat does not come from the defendant, however, the State must show it was made by someone

acting with his knowledge and consent. State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). The court must balance the probative value and prejudicial effect of such evidence under ER 404(b) before it is admitted. State v. McGhee, 57 Wn. App. 457, 460, 788 P.2d 603, review denied, 115 Wn.2d 1013 (1990).

Here, as the trial court recognized, there was no evidence connecting Robles to any communications to SK or her family after the case was set for trial. The testimony sought by the prosecutor was thus irrelevant and highly prejudicial, and it was inadmissible under ER 404(b). RP 128. Moreover, the prosecutor did not afford the court the opportunity to rule on admissibility before asking about the communications in the presence of the jury, raising the implication of guilt. As in Babcock, this reference to other bad acts suggestive of guilt was a very serious trial irregularity.

Additionally, there was no other evidence that Robles, or anyone acting with his knowledge or consent, had threatened SK or her family. The lack of cumulative evidence also weighs in favor of mistrial.

Finally, the trial court's instruction to disregard was insufficient to cure the irregularity. In concluding that an instruction was the appropriate cure, the court found that the prosecutor's question was innocuous and unanswered, and the irregularity was a small piece in the grand scheme.

RP 131. The court's findings overlook the serious nature of the trial irregularity. The prosecutor's question, even unanswered, carried with it the implication that Robles was threatening the State's key witness because he knows he is guilty. Such an implication, when completely unsupported by evidence, cannot be characterized as innocuous. In the grand scheme of things, this case came down to a credibility determination. The jury could believe either SK or Robles. Under the circumstances, there is no guarantee that the jury could have effectively disregarded the prosecutor's highly prejudicial and unsupported consciousness of guilt implication. The prosecutor's conduct deprived Robles of a fair trial, and the trial court abused its discretion by denying the motion for a mistrial. This Court should reverse Robles's conviction and remand for a new trial.

2. THE PROSECUTOR'S CLEAR AND UNMISTAKABLE
ASSERTION OF HIS PERSONAL BELIEF AS TO THE
CREDIBILITY OF THE STATE'S KEY WITNESS
DENIED ROBLES HIS CONSTITUTIONAL RIGHT TO
A FAIR TRIAL.

a. **The prosecutor expressed his personal opinion in
closing argument.**

In his closing argument, the prosecutor told the jury that Robles did not dispute the things that SK said happened before January 2011 or what she said happened after January 2011. He argued that the one thing

Robles did not agree with was “what happened inside that house.” He continued,

Why would we agree and believe her on all these other details before and after, but not believe her on the one part of the entire case, the one reason we’re here, the sexual abuse? Why would we not believe her when we believe all these other facts?

RP 217. He repeatedly told the jury that SK was not lying, that she could not possibly “fabricate this entire event[,]” and she could not fabricate her experience. RP 220, 222, 230. He told the jury that Robles’s testimony about SK seeing pictures of his house was ridiculous. RP 227. He said that SK knew too much about the house and that Robles was guilty. RP 230. Defense counsel did not object to the prosecutor’s improper argument.

b. The prosecutor’s misconduct requires reversal.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct.1691, 48L.Ed.2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). The prosecutor, as an officer of the court, has a duty to see that the accused receives a fair trial. State v. Carlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). While a prosecutor “may strike hard blows, he is not at liberty to strike foul ones.

It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

Prosecutorial misconduct may deprive the defendant of a fair trial, and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3. “A “fair trial” certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.”” State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); State v. Reed, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984)). Thus, in the interest of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. Charlton, 90 Wn.2d at 664.

A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor’s misconduct affected the verdict. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48). When the defendant establishes misconduct and resulting prejudice,

reversal is required. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

The prosecutor committed misconduct in this case when he assured the jury of his personal belief in SK's credibility and Robles's guilt. He clearly and unmistakably expressed his opinion that SK was telling the truth and could not have fabricated her testimony about the alleged incident, which directly contradicted Robles's testimony. By asking the jury "why would we not believe her?" he clearly inserted his opinion into the jury's decision-making process. It is misconduct for a prosecutor to vouch for a witness by expressing his personal belief as to the witness's truthfulness. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). "Whether a witness has testified truthfully is entirely for the jury to determine." Ish, 170 Wn.2d at 196. And by expressing his belief that Robles's testimony was "ridiculous," the prosecutor communicated his opinion as to Robles's guilt. It is also improper for the prosecutor to express an independent, personal opinion as to the defendant's guilt. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

The prosecutor's misconduct requires reversal despite defense counsel's failure to object. Even where defense counsel fails to object, reversal is required if the misconduct was so flagrant and ill-intentioned

that a curative instruction could not have obviated the resulting prejudice. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); Belgarde, 110 Wn.2d at 507. “[T]he failure to object will not prevent a reviewing court from protecting a defendant’s constitutional right to a fair trial.” State v. Walker, ___ Wn.2d ___ (Cause No. 89830-9, Slip Op. at 12-13, filed 1/22/15). “An objection is unnecessary in cases of incurable prejudice only because there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” Id. (internal quotation omitted) (citing State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012)).

The prejudice resulting from the prosecutor’s impermissible argument in this case could not have been cured. The prosecutor vouched for the credibility of the State’s key witness. Not only was she the alleged victim, but her testimony was the only evidence that the charged incident even occurred. It was crucial to the State’s case that the jury believe SK. But the prosecutor’s personal assurances that she was believable unfairly bolstered her credibility. The prosecutor’s assurances created an enduring prejudice that could not have been neutralized by a curative instruction. See State v. Sargent, 40 Wn. App. 340, 345, 698 P.2d 598 (1985) (prosecutor’s statement in closing argument that he believed the State’s witness could not have been cured with appropriate instruction and

deprived defendant of a fair trial). The prosecutor's misconduct deprived Robles of a fair trial, and his conviction must be reversed.

D. CONCLUSION

The trial court's refusal to declare a mistrial and the prosecutor's misconduct in closing argument denied Robles a fair trial. This Court should reverse his conviction and remand for a new trial.

DATED January 23, 2015.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Catherine E. Glinski", written in a cursive style.

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Certification of Service by Mail

Today I mailed a copy of the Brief of Appellant in *State v.*

Nicholas Robles, Cause No. 46587-6-II as follows:

Nicholas Robles DOC# 332667
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
January 23, 2015